

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

11 JOSE RUVALCABA,)
12 Petitioner,) No. C 08-2483 CRB (PR)
13 vs.) ORDER GRANTING
14 BEN CURRY, Warden,) PETITION FOR WRIT OF
15 Respondent.) HABEAS CORPUS
16 _____)
17
18 Petitioner, a state prisoner incarcerated at the Correctional Training
19 Facility in Soledad, California, has filed a pro se Petition for a Writ of Habeas
20 corpus under 28 U.S.C. § 2254 challenging the California Board of Parole
21 Hearings' ("BPH") May 9, 2007 decision to deny him parole on the ground that
22 the decision does not comport with due process. Doc. #1. Per order filed on July
23 22, 2008, the Court found that the Petition, when liberally construed, appeared to
24 state a cognizable claim under 28 U.S.C. § 2254 and ordered Respondent to show
25 cause why a writ of habeas corpus should not be granted. Doc. #5. Respondent
26 has filed and Answer and Petitioner has filed a Traverse. Doc. ## 6 & 7.
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BACKGROUND

A. The Commitment Offense

On May 5, 1990, Petitioner was convicted of attempted murder in Contra Costa County Superior Court and sentenced to an indeterminate term of seven-years-to-life in state prison. At his May 9, 2007 parole suitability hearing, BPH read the following summary of Petitioner's commitment offense, as derived from the first two pages of a November 2005 counselor's report.

In Spring of 1990, . . . [Petitioner] and victim June Hidalgo began a roman[tic] relationship. During the following two or three months, the two spent a great deal of time together, evenings and weekends.

During this time, the two became intimate physically and in late April, [Petitioner] asked the victim to marry him. Approximately two weeks later, the victim told [Petitioner] that she no longer wanted to go out with him. [Petitioner] became extremely upset, crying, locking himself in his bedroom all night.

The following day, May 4th, 1990, [Petitioner] came out of his room to help his brother with a stalled vehicle. This was when [Petitioner] acquired the handgun used in the attempted homicide, locating the gun in his uncle's toolbox.

After starting and stalling the vehicle, [Petitioner] set out to the victim's home to contact the victim's grandmother. He then went to a mutual friend's home, Corey, who stated that he and . . . other friends at the apartment were waiting for [the victim] to arrive.

While there, the victim called and after speaking to her friends, [Petitioner] got on the telephone and asked her why she was breaking up with him. The victim told him that she no longer wanted to speak with him and hung up on him.

[Petitioner] began crying and told his friends “I’m going to get that bitch” and “Nice knowing you guys.” He then followed Stacey Cushman, one of their mutual friends from the apartment, to Mount Diablo High School tennis courts, . . . where she and [the victim] had earlier agreed to meet.

1 Upon arrival of the victim at the parking lot of
2 the high school on a motorcycle driven by Ron
3 Adams, [Petitioner] drove up in his car, exited the
4 vehicle with the gun in his hand, and the victim cried
5 out, "Jose, no" . . . and bent down, cowering and . . .
6 putting . . . her hands protectively over her head.
7

8 [Petitioner] pulled the trigger, but no bullet
9 came out. Then he fired three more times, hitting the
10 victim through her hands, entering the rear of her
11 head. She collapsed and [Petitioner] then shot
12 himself in the head as well.
13

14 Both were transported to John Muir Trauma
15 Center. The victim was in a coma for [ten] days,
16 remained hospitalized for two months. As a result of
17 the bullet wound to her head, June Hidalgo sustained
18 permanent serious visual impairment. She has no
19 direct vision and . . . can no longer see shapes in
20 detail, nor can she read.
21

22 [Petitioner] sustained a head wound that
23 affected his speech, necessitating extensive speech
24 therapy. [Petitioner] was subsequently convicted by a
25 jury for attempted murder on 11/25/91.
26

27 Doc. #6-1 at 52-54.

28 B. The May 9, 2007 Parole Suitability Hearing and Petitioner's State Court
Challenge to BPH's Decision to Deny Him Parole

1 On May 9, 2007, Petitioner appeared before BPH for his fifth parole
2 suitability hearing. Doc. #6-1 at 70. At that hearing, BPH again found Petitioner
3 was not suitable for parole and would pose an unreasonable risk to society or
4 threat to public safety if released from prison. Doc. #6-2 at 60-61. In denying
5 Petitioner parole, BPH relied on the circumstances of the commitment offense,
6 which it noted "was carried out in an especially cruel manner" and
7 "demonstrate[d] disregard for human suffering." Id. at 61-62. BPH also cited the
8 district attorney's opposition to Petitioner's release, as well as concern over what
9 it termed a "little gap" in Petitioner's "understanding of the critical elements that
10 led to the life crime." Id. at 66, 68 & 70. Petitioner's minimum eligible parole
11 date was October 30, 1998. Doc. #6-1 at 3 & 32.
12

1 After BPH recited the facts of Petitioner's commitment offense, he was
2 asked to explain his actions. Petitioner stated:

3 Well, first of all, sir, I'm so ashamed of what I
4 did back in those days, you know. I know that now
5 the way I feel about life is just [no] way to think
6 about the pain. I know I remember back in those
7 days, back in that moment I had so many problems in
8 my house and I was getting legalized and all those
9 things ha[d] got into my mind and at that moment, I
10 didn't care for life and she got me upset and problems
11 that were in my house. All those things made me lose
12 my head.

13 I know I can't believe I did it, you know? It's
14 so hard for me to even think that I'd go and hurt a
15 person at that time . . . I was still solely immature.
16 Now that I'm totally mature, I think – Now I think
17 that, God, it was so – it was just – Think about it, it
18 just makes me drop down and get –

19 I know she doesn't deserve no [sic] pain of
20 any kind, . . . it's just so difficult for me to even
21 express myself in front of you, sir, and to a whole
22 community, to a whole world.

23 Doc. #6-1 at 54-55.

24 In announcing its decision denying Petitioner parole, BPH acknowledged
25 Petitioner's remorse, noting:

26 [W]e believe there's no question in our mind that you
27 feel horribly sorry for the events that occurred, . . .
28 you've come to grips with this horrible crime . . . that
you did. That's at least something in terms of you.

29 Your family has suffered . . . and her family
30 has certainly suffered. Your friends that were
31 surrounding this have all suffered and I think you
32 have a wonderful grasp on all that.

33 Doc. #6-2 at 60. Later in the decision, BPH repeated, "[t]here's no question that
34 you've come to grips with the crime." Immediately following this statement,
35 however, BPH noted:

36 There is a little gap there what we would like you to
37 work on for this next year that we believe is

1 something . . . it would do you well and make us, the
2 Parole Board, feel a little better about your ability to
3 handle future situations that may come up, whether
4 they be romantically based or . . . something based at
5 work.

6 We want to feel absolutely sure that you're
7 going to handle these things in an adult, mature way
8 and . . . while we recognize you said over and over
9 and over it would never happen again, I'm sure prior
10 to this you never thought this would happen. So we
11 want to make absolutely sure that you're going to . . .
12 have all the tools at your disposal to get through some
13 other circumstances . . . that I will guarantee you
14 inevitably will happen in your life, that will not be
15 comfortable and be difficult to deal with for anybody.

16 Id. at 68-69.

17 BPH acknowledged the “extensive amount of work with regard to
18 [Petitioner’s] parole plans” noting he had two “well sought after vocations” and
19 that his employment plans “seem to be viable.” Doc. #6-2 at 67. During the
20 evidentiary portion of the hearing, BPH noted the numerous letters of support
21 Petitioner received from family members and friends, which offered Petitioner
22 employment, financial support and a place to live. See Doc. #6-2 at 15-25.

23 In terms of his behavior prior to the commitment offense, BPH noted that
24 Petitioner had “virtually no criminal record. . . . no juvenile record, nor adult
25 record. So there is no escalation of any pattern. This seemed to be some form of
isolated event” Doc. #6-2 at 64. Regarding his behavior in prison, BPH
noted that Petitioner had “done well while in prison” and that he had accrued
only one serious rules violation eleven years prior. Id. at 65. BPH later learned
that this was due to Petitioner’s participation in a prison work stoppage. Id. at 80.

26 Finally, during the evidentiary portion of the hearing, BPH cited
27 extensively to Petitioner’s most recent psychological evaluation. See Doc. #6-1
28 at 81-83; Doc. #6-2 at 2-4. That evaluation, in relevant part, noted:

[Petitioner] related during the interview in an open
sincere and earnest manner. His mental status was

1 within normal limits. He was alert and well oriented.
2 His thinking was rational, logical and coherent. His
3 speech was normal, fluent and goal oriented. English
4 is his second language. However, he communicates
5 quite well in English. He actually has achieved his
6 GED, which is remarkable. He stated that sometimes
7 under stress he has difficulty expressing himself in
8 English. Sometimes in the BPH hearing this occurs
9 to him. However, under normal conditions, he
10 communicates very well. His eye contact was good.
11 His affect was appropriate. There was no evidence of
12 anxiety or of depression. His memory was intact.
13 His judgment was good. His insight and self-
14 awareness were excellent.

15 This man has no alcohol or drug issues at all.
16 This is not an issue in this case.

17 Before coming to prison, he was experienced
18 as an automobile mechanic. He has participated for
19 three years at [Deuel Vocational Institution] in auto
20 mechanics, earning a certificate of completion. In
21 addition, he has spent three years working in
22 autobody. He has excellent skills in this field. He
23 has job offers in Mexico, where he plans to go as a
24 mechanic.

25 See Doc. #1-2 at 25. The psychologist further observed Petitioner as having no
26 mental disorder and no personality disorder. Id.

27 In reviewing Petitioner's life crime, the psychologist noted:

28 [Petitioner] accepts full responsibility for the
29 commitment offense. He accepts the written version
30 of the commitment offense. He has reviewed this
31 offense at length with Dr. Sexton in the 10/11/04
32 report. In addition, he has also reviewed the
33 dynamics associated with this offense with this
34 writer. Since this information has been reviewed at
35 length, it will only be summarized at this point. At
36 the time [of the commitment offense, Petitioner] was
37 under a great deal of emotional stress. Family
38 dynamics outlined in the previous report resulted in
39 his desire to support his family, but at the same time
40 to leave his family and become independent. At the
41 time, the family dynamics were overwhelming to
42 him, and he felt quite trapped. He had put all of his
43 hopes, dreams and expectations into the relationship
44 with the victim. He was planning on marriage. At
45 the same time, he was under pressure at work,

1 because they demanded papers that he had obtained
2 legal residency or he would lose his job. In the midst
3 of all this stress, the victim, his fiancee broke off his
4 relationship abruptly without any explanations. The
result was that he lost complete control, and he was
overcome with feelings of hurt, rejection, anger and
jealousy, as well as confusion.

5 [Petitioner] expresses deep feelings of sorrow
6 and remorse about his actions at that time. He was 21
7 years of age, and he was totally overwhelmed by his
situation. At the time he felt that he had nothing
8 more for which to live. As a result, he also attempted
suicide. Looking back at it now as a mature adult at
the age of 37, he realizes how bad his choices were.
He expresses deep feelings of sorrow, shame and
9 remorse at the injury he caused to his fiancee. His
feelings of remorse appear to be quite sincere and
genuine.

11 [Petitioner] has explored the commitment
offense and the underlining [sic] causes at length. I
12 agree with Dr. Sexton's assessment that his
explanation of the causes related to this offense is
outstanding. He totally understands what motivated
13 him to become involved in this offense at the time.
He continues to be remorseful and bothered by this
action. He does not need to participate in any further
counseling, therapy or self-help groups in order to
14 understand himself and his actions better at that time.
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17 Doc. #1-2 at 25-26; see also id. at 28-33 (October 11, 2004 report of Dr. Sexton).

18 In his assessment of Petitioner's dangerousness, the psychologist
19 observed:

20 In considering potential for dangerous
behavior when released to the community . . . [the
21 results of Petitioner's psychological testing] means
that if 100 men were released on parole, he would do
22 better on parole than 99 of them. This is an
extremely low risk level. As a result, he poses no
23 more risk to society than the average citizen in the
community. In fact, based upon his self-
understanding, life experiences, growth and maturity
24 over the years, he probably poses less risk to society
25 than the average citizen in the community.

26 Doc. #1-2 at 26.

The psychologist's clinical conclusion reads as follows:

There are no mental or emotional problems in this case that would interfere with routine parole planning. [Petitioner] has an immigration hold, and he plans to return to Mexico upon his release. He has a great deal of family support in Mexico. In addition to offers of residence, he also has job offers. He is an experienced mechanic, and his skills are highly desirable in the community. Employment will not be a problem in this case. The prognosis for successful adjustment in the community is very excellent.

Doc. #1-2 at 26.

Petitioner challenged BPH's May 9, 2007 decision in the California Supreme Court, which summarily denied relief on March 19, 2008. Doc. #6-3 at 2. On May 15, 2008, Petitioner filed the instant Petition for a Writ of Habeas Corpus.

LEGAL STANDARD

The Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”), codified under 28 U.S.C. § 2254, provides “the exclusive vehicle for a habeas petition by a state prisoner in custody pursuant to a state court judgment, even when the petitioner is not challenging his underlying state court conviction.”

White v. Lambert, 370 F.3d 1002, 1009-10 (9th Cir. 2004). Under AEDPA, this Court may entertain a petition for habeas relief on behalf of a California state inmate “only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.” 28 U.S.C. § 2254(a).

The writ may not be granted unless the state court's adjudication of any claim on the merits: "(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence

1 presented in the State court proceeding.” 28 U.S.C. § 2254(d). Under this
 2 deferential standard, federal habeas relief will not be granted “simply because
 3 [this] [C]ourt concludes in its independent judgment that the relevant state-court
 4 decision applied clearly established federal law erroneously or incorrectly.
 5 Rather, that application must also be unreasonable.” Williams v. Taylor, 529
 6 U.S. 362, 411 (2000).

7 While circuit law may provide persuasive authority in determining
 8 whether the state court made an unreasonable application of Supreme Court
 9 precedent, the only definitive source of clearly established federal law under 28
 10 U.S.C. § 2254(d) is in the holdings (as opposed to the dicta) of the Supreme
 11 Court as of the time of the state court decision. Id. at 412; Clark v. Murphy, 331
 12 F.3d 1062, 1069 (9th Cir. 2003).

13 When the state court decisions do not provide a reasoned opinion, as in
 14 this case, the Court “must conduct an independent review of the record to
 15 determine whether the state court’s decision was objectively unreasonable.” Sass
 16 v. California Bd. of Prison Terms, 461 F.3d 1123, 1127 (9th Cir. 2006).

17 DISCUSSION

18 A. Due Process and the “Some Evidence” Standard for Parole Suitability Determinations

19 The Fifth and Fourteenth Amendments prohibit the government from
 20 depriving a prisoner of life, liberty or property without due process of law. U.S.
 21 Const. Amends. V & XIV. It is now settled that California’s parole scheme,
 22 codified in California Penal Code section 3041, vests all “prisoners whose
 23 sentences provide for the possibility of parole with a constitutionally protected
 24 liberty interest in the receipt of a parole release date, a liberty interest that is
 25 protected by the procedural safeguards of the Due Process Clause.” Irons v.
 26 Carey, 505 F.3d 846, 850 (9th Cir. 2007) (citing Sass, 461 F.3d at 1128); Biggs v.
 27

1 Terhune, 334 F.3d 910, 914 (9th Cir. 2003); McQuillon v. Duncan, 306 F.3d 895,
 2 903 (9th Cir. 2002). It does not matter that a parole release date has not been set
 3 for the prisoner because “[t]he liberty interest is created, not upon the grant of a
 4 parole date, but upon the incarceration of the inmate.” Biggs, 334 F.3d at 915.
 5 Due process accordingly requires that a parole board premise its decision
 6 regarding a petitioner’s parole suitability on “some evidence in the record” such
 7 that the decision is not arbitrary. Sass, 461 F.3d at 1128-29 (quoting
 8 Superintendent v. Hill, 472 U.S. 445, 457 (1985)). The “some evidence”
 9 standard is clearly established federal law in the parole context for purposes of 28
 10 U.S.C. § 2254(d). Sass, 461 F.3d at 1129.

11 The Supreme Court set forth the “some evidence” standard in Hill, which
 12 concerned the revocation of “good time” credits towards parole resulting from
 13 prisoner misconduct. Hill, 472 U.S. at 455. The Court rested its holding upon
 14 the procedural due process foundation it laid in Wolff v. McDonnell, 418 U.S.
 15 539, 563-67 (1974). As the Court noted, Wolff required, among other things, that
 16 a prisoner receive “a written statement by the fact finder of the evidence relied on
 17 and the reasons” for the deprivation of his good time credits. Hill, 472 U.S. at
 18 454 (citing Wolff, 418 U.S. at 565). The Court then added to the foundation it
 19 laid in Wolff: “[R]evocation of good time does not comport with ‘the minimum
 20 requirements of procedural due process,’ unless the findings of the prison
 21 disciplinary board are supported by some evidence in the record.” Hill, 472 U.S.
 22 at 455 (quoting Wolff, 418 U.S. at 558).

23 The “some evidence” standard does not permit the Court to “reweigh the
 24 evidence.” Powell v. Gomez, 33 F.3d 39, 42 (9th Cir. 1994). Instead, the inquiry
 25 is “whether there is any evidence in the record that could support the conclusion
 26 reached by the disciplinary board.” Hill, 472 U.S. at 455-56. While this test is
 27
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1 not stringent, it must at minimum protect a prisoner’s “strong interest in assuring
 2 that the loss of [parole] is not imposed arbitrarily.” *Id.* at 454.

3 Due process also requires that the evidence underlying the parole board’s
 4 decision have some indicium of reliability. Biggs, 334 F.3d at 915; McQuillion,
 5 306 F.3d at 904. Relevant to this inquiry is whether the prisoner was afforded an
 6 opportunity to appear before, and present evidence to, the board. See Pedro v.
 7 Oregon Parole Bd., 825 F.2d 1396, 1399 (9th Cir. 1987). If BPH’s determination
 8 of parole unsuitability is to satisfy due process, there must be some reliable
 9 evidence to support the decision. Rosas v. Nielsen, 428 F.3d 1229, 1232 (9th Cir.
 10 2005).

11 B. California Law Regarding Parole Suitability Determinations

12 When assessing whether a state parole board’s suitability determination
 13 was supported by “some evidence,” the Court’s analysis is framed by the statutes
 14 and regulations governing parole suitability determinations in the relevant state.
 15 Irons, 505 F.3d at 850. Under California law, prisoners serving indeterminate life
 16 sentences, like Petitioner, become eligible for parole after serving minimum
 17 terms of confinement required by statute. In re Dannenberg, 34 Cal. 4th 1061,
 18 1069-70 (2005). At that point, California’s parole scheme provides that BPH
 19 “shall set a release date unless it determines that the gravity of the current
 20 convicted offense or offenses, or the timing and gravity of current or past
 21 convicted offense or offenses, is such that consideration of the public safety
 22 requires a more lengthy period of incarceration.” Cal. Pen. Code § 3041(b).
 23 Regardless of the length of the time served, “a life prisoner shall be found
 24 unsuitable for and denied parole if in the judgment of the panel the prisoner will
 25 pose an unreasonable risk of danger to society if released from prison.” Cal.
 26 Code Regs. tit. 15, § 2402(a). In making this determination, BPH must consider
 27

1 various factors, including the prisoner's social history, past and present mental
 2 state, past criminal history, the base and other commitment offenses, including
 3 behavior before, during and after the crime, past and present attitude toward the
 4 crime and any other information that bears on the prisoner's suitability for
 5 release. See Cal. Code Regs. tit. 15, § 2402(b)–(d).

6 In considering the commitment offense, BPH must determine whether "the
 7 prisoner committed the offense in an especially heinous, atrocious or cruel
 8 manner." Cal. Code Regs. tit. 15, § 2402(c)(1). The factors to be considered in
 9 making that determination include: "(A) Multiple victims were attacked, injured
 10 or killed in the same or separate incidents; (B) The offense was carried out in a
 11 dispassionate and calculated manner, such as an execution-style murder; (C) The
 12 victim was abused, defiled or mutilated during or after the offense; (D) The
 13 offense was carried out in a manner which demonstrates an exceptionally callous
 14 disregard for human suffering; (E) The motive for the crime is inexplicable or
 15 very trivial in relation to the offense." Id.

16 Under California law, the "core determination" regarding a prisoner's
 17 threat to public safety "involves an assessment of an inmate's *current*
 18 dangerousness." See In re Lawrence, 44 Cal. 4th 1181, 1205 (2008) (emphasis in
 19 original) (citing In re Rosenkrantz, 29 Cal. 4th 616 (2002) and In re Dannenberg,
 20 34 Cal. 4th 1061 (2005)). According to the state supreme court,

21 to the extent our decisions in Rosenkrantz and
 22 Dannenberg have been read to imply that a
 23 particularly egregious commitment offense *always*
 24 will provide the requisite modicum of evidence
 25 supporting the Board's or the Governor's decision,
 26 this assumption is inconsistent with the statutory
 mandate that the Board and the Governor consider all
 relevant statutory factors when evaluating an inmate's
 suitability for parole, and inconsistent with the
 inmate's due process liberty interest in parole that we
 recognized in Rosenkrantz.

1 Lawrence, 44 Cal. 4th at 1191 (emphasis in original). The court continued:

2 In some cases, such as this one, in which evidence of
 3 the inmate's rehabilitation and suitability for parole
 4 under the governing statutes and regulations is
 5 overwhelming, the only evidence related to
 6 unsuitability is the gravity of the commitment
 7 offense, and that offense is both temporally remote
 8 and mitigated by circumstances indicating the
 9 conduct is unlikely to recur, the immutable
 10 circumstance that the commitment offense involved
 11 aggravated conduct does not provide "some
 12 evidence" *inevitably* supporting the ultimate decision
 13 that the inmate remains a threat to public safety.

14 *Id.* (emphasis in original).

15 C. Ninth Circuit Law Regarding Parole Suitability Determinations

16 A critical issue in parole denial cases concerns BPH's use of evidence
 17 about the crime that led to the conviction. A trio of Ninth Circuit cases guide the
 18 application of the Superintendent v. Hill "some evidence" standard in
 19 determining whether or not a particular prisoner would pose an unreasonable risk
 20 of danger to society or a threat to public safety if released from prison, taking into
 21 account the circumstances of the commitment offense: Biggs, 334 F.3d 910,
 22 Sass, 461 F.3d 1123, and Irons, 505 F.3d 846. The first case, Biggs, explained
 23 that the value of the criminal offense fades over time as a predictor of parole
 24 suitability:

25 The Parole Board's decision is one of 'equity' and
 26 requires a careful balancing and assessment of the
 27 factors considered. . . . A continued reliance in the
 28 future on an unchanging factor, the circumstance of
 29 the offense and conduct prior to imprisonment, runs
 30 contrary to the rehabilitative goals espoused by the
 31 prison system and could result in a due process
 32 violation.

33 Biggs, 334 F.3d at 916-17. Although the court in Biggs upheld the initial denial
 34 of a parole date based solely on the nature of the crime and the prisoner's conduct
 35 before incarceration, it cautioned that "[o]ver time . . . , should Biggs continue to

1 demonstrate exemplary behavior and evidence of rehabilitation, denying him a
 2 parole date simply because of the nature of Biggs' offense and prior conduct
 3 would raise serious questions involving his liberty interest in parole." *Id.* at 916.

4 Next came Sass, which criticized the court's statements in Biggs as
 5 improper and beyond the scope of the dispute before the court. Sass determined
 6 that the parole board is not precluded from relying on unchanging factors such as
 7 the circumstances of the commitment offense or the parole applicant's
 8 pre-offense behavior in determining parole suitability. See Sass, 461 F.3d at
 9 1129 (commitment offenses in combination with prior offenses provided some
 10 evidence to support denial of parole at subsequent parole consideration hearing).

11 The last of the three cases, Irons, determined that due process was not
 12 violated by the use of the commitment offense and pre-offense criminality to
 13 deny parole for a prisoner sixteen years into his seventeen-to-life sentence. Irons
 14 emphasized, however, that in all three cases (Irons, Sass and Biggs) in which the
 15 court had "held that a parole board's decision to deem a prisoner unsuitable for
 16 parole solely on the basis of his commitment offense comports with due process,
 17 the decision was made before the inmate had served the minimum number of
 18 years required by his sentence." Irons, 505 F.3d at 853. The court, citing Biggs,
 19 then expressed "hope that the Board will come to recognize that in some cases,
 20 indefinite detention based solely on an inmate's commitment offense, regardless
 21 of the extent of his rehabilitation, will at some point violate due process, given
 22 the liberty interest in parole that flows from the relevant California statutes." *Id.*
 23 at 854.

24 D. Analysis of Petitioner's Due Process Claim

25 Petitioner seeks federal habeas corpus relief from BPH's May 9, 2007
 26 decision finding him not suitable for parole, and denying him a subsequent
 27

1 hearing for one year, on the ground that the decision does not comport with due
2 process. Specifically, Petitioner claims that BPH's decision is not supported by
3 the evidence in the record and instead is based on the unchanging facts of his
4 commitment offense. Doc. #1. Respondent answers that Petitioner has not
5 demonstrated that the state court decision was contrary to, or an unreasonable
6 application of, clearly established federal law, or that it was based on an
7 unreasonable determination of the facts, and that therefore he is not entitled to
8 relief. Doc. #6 at 4.

9 After a careful independent review of the record, the Court finds that the
10 state court's implicit determination that BPH's decision to deny Petitioner parole
11 was supported by "some evidence" was objectively unreasonable. See 28 U.S.C.
12 § 2254(d); Sass, 461 F.3d at 1127.

13 At his 2007 parole suitability hearing, BPH found Petitioner was not
14 suitable for parole and would pose an unreasonable risk to society or threat to
15 public safety if released from prison. Doc. #6-2 at 60-61. BPH based its decision
16 primarily on the circumstances of the commitment offense, but also relied on
17 what it viewed as a "little gap" in Petitioner's "understanding of the critical
18 elements that led to the life crime." Id. at 66, 68 & 70. Neither factor constitutes
19 some reliable evidence in support of BPH's decision to deny Petitioner parole.

20 According to the psychologist who evaluated Petitioner prior to his 2007
21 hearing, Petitioner posed "no more risk to society than the average citizen in the
22 community. In fact, based upon his self-understanding, life experiences, growth
23 and maturity over the years, he probably poses less risk to society than the
24 average citizen in the community." Doc. #1-2 at 26. The psychologist concluded
25 that Petitioner's "prognosis for successful adjustment in the community is very
26 excellent." Id. And regarding Petitioner's "understanding of the critical

elements that led to the life crime," the psychologist directly contradicted BPH's finding, observing:

[Petitioner] has explored the commitment offense and the underlining [sic] causes at length. I agree with Dr. Sexton's assessment that his explanation of the causes related to this offense is outstanding. He totally understands what motivated him to become involved in this offense at the time. He continues to be remorseful and bothered by this action. He does not need to participate in any further counseling, therapy or self-help groups in order to understand himself and his actions better at that time.

Doc. #1-2 at 25-26; see also id. at 28-33 (October 11, 2004 report of Dr. Sexton). In fact, nothing in the record supports BPH's finding that there was a gap in Petitioner's understanding of the circumstances that led to his attempted murder of his former girlfriend. During the course of his parole suitability hearing, Petitioner was insightful and remorseful about the commitment offense and underlining causes, prompting BPH to comment that "[t]here's no question that you've come to grips with the crime." Doc. #6-2 at 68.

In light of the conclusion reached by the two licensed psychologists who evaluated Petitioner, and the lack of any evidence in the transcript of the May 9, 2007 parole suitability hearing or other part of the record indicating that there was a gap in Petitioner's understanding of the underlining causes to led to the crime, the Court dismisses BPH's concern that Petitioner was not yet equipped to transition successfully back into the community if he were granted parole, see Doc. #6-2 at 68-69, as not supported by some reliable evidence. See Rosas, 428 F.3d at 1232 (if BPH's determination of parole unsuitability is to satisfy due process, there must be some reliable evidence to support the decision). Also weighing heavily in favor of a finding of suitability was the solid support system that awaited Petitioner upon his release, documented by the numerous letters of

1 support he received from family members and friends, which included multiple
2 firm offers of employment, financial support, as well as a place to live. See Doc.
3 #6-2 at 15-25.

4 Petitioner's criminal offense was an isolated aberration in his past,
5 "temporally remote" – committed some seventeen years earlier – and certainly
6 mitigated by various circumstances indicating the conduct is unlikely to recur.
7 See Lawrence, 44 Cal. 4th at 1191. At the time BPH denied Petitioner a parole
8 date for the fifth time in 2007, he had served seventeen years on his seven-to-life
9 sentence, almost nine years past his minimum eligible parole date. Perhaps in
10 some cases the circumstances of a prisoner's commitment offense reasonably
11 may continue to predict his future even in spite of a prisoner's dramatic
12 behavioral improvement while in prison. But, where, as here, Petitioner's
13 complete lack of a violent history, his strong and wide-spread support from
14 family and friends, realistic parole plans that included multiple offers of
15 employment, financial support, and a place to live, highly favorable
16 psychological evaluations and his lack of any serious disciplinary violations
17 throughout his entire time spent behind bars, his continued imprisonment based
18 on the circumstances of his 1990 commitment offense rises to the level of a due
19 process violation the Ninth Circuit envisioned. See Irons, 505 F.3d at 854 ("in
20 some cases, indefinite detention based solely on an inmate's commitment
21 offense, regardless of the extent of his rehabilitation, will at some point violate
22 due process, given the liberty interest in parole that flows from the relevant
23 California statutes"). Put in terms of Hill's "some evidence" standard, under the
24 circumstances of this case, the circumstances of Petitioner's commitment offense
25 of seventeen years ago do not constitute some evidence sufficient to support the
26 conclusion that petitioner remains a threat to public safety. See Hill, 472 U.S. at
27

1 455; Lawrence, 44 Cal. 4th at 1191.

2 After careful review of the law and the entire record now before the Court,
3 it is difficult, if not impossible, to reconcile BPH's decision to deny Petitioner
4 parole with the evidence upon which it relied to make that decision. The Court
5 finds the record was "so devoid of evidence that the findings of [BPH] were
6 without support or otherwise arbitrary." Hill, 472 U.S. at 457. The state court's
7 implicit determination that BPH's finding that Petitioner was unsuitable for
8 parole and posed an unreasonable danger to society or threat to public safety if
9 released from prison constituted "some evidence" of unsuitability was objectively
10 unreasonable. See 28 U.S.C. § 2254(d); Sass, 461 F.3d at 1127. There simply
11 was no reliable evidence to suggest that Petitioner would pose an unreasonable
12 risk of danger to society or a threat to public safety if released on parole. Cal.
13 Code Regs. tit. 15, § 2402(a). Petitioner is entitled to federal habeas relief on his
14 due process claim.

15 **CONCLUSION**

16 For the reasons stated above, the Petition for Writ of Habeas Corpus is
17 GRANTED. Within twenty (20) days of the date of this order, BPH must
18 calculate a term for Petitioner and set an imminent date for his release in
19 accordance with California Penal Code § 3041(a). Within ten (10) days of
20 Petitioner's release, Respondent must file a notice with the Court confirming the
21 date on which Petitioner was released.

22 The Clerk is instructed to enter judgment in accordance with this order.
23 SO ORDERED.

24 DATED: April 8, 2010


CHARLES R. BREYER
United States District Judge

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